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THE UTILITY MELTING POT

By OMAR E. GARWOOD, *of the Denver Bar*

WHILE we are casting into the crucible of "public use" an ever-increasing amount of private American business, with a confusing mixture of approval and disapproval by the judicial branches of our national and state governments, an interesting evolution is taking place which potentially may alter the structure of our American system of government and change the axiomatic alignment of powers to such extent that we may be compelled to recognize a fourth department, under the designation of administrative power.

MILK AS A UTILITY

The Court of Appeals of New York, recognized as one of the ablest tribunals in America, has held that the sale of milk is a paramount industry and is clothed with a public interest and the state, through an administrative agency, may fix the price and deny the citizen a license to engage in the business: For eighteen cents a Rochester grocer sold two bottles of milk and a loaf of bread, and thereby committed a crime. Thus milk has been made a public utility and the lawful minimum price in New York is nine cents per quart.

ICE IS NOT A UTILITY

But the manufacture and sale of ice will not mix in the utility melting pot; the Supreme Court of the United States says that it is a private business and is not subject to such regulation by the legislative branch of the government.

Affectation with a public interest, the equivalent of a certificate of public convenience, the police power, the exigencies of relief in a nation-wide depression, unemployment, over-production and economic necessity of price control are considerations that enter into the problem of what may and what may not be classified as a utility. The legislature cannot by mere legislative fiat convert a business into a public utility; the concept of a public utility is not static.

PRICE-FIXING

Price-fixing in economic emergencies is not new. Parliament has fixed the price of commodities and services many

times, and our own colonies, during the Revolution, fixed the price of almost every marketable commodity.

Emergency measures to control rentals on real estate, fire insurance rates, prices of bread, the services of chimney sweepers, the operation of cotton gins and flour mills have been upheld as within the regulatory powers of the legislature, but the Supreme Court of the United States has held that production and sale of food and clothing cannot be subjected to price regulation on the basis of public use; nor can the business of renting houses and apartments, except as temporary measures to tide over grave emergencies. An arbitration board may not fix wages, the state may not fix the price of gasoline, or the price of theatre tickets by speculators, or the fees of employment agents.

If cotton ginning and flour milling are paramount industries in some states and are clothed with public use sufficient to place them in the utility classification, it would seem that in Colorado the beet sugar industry, coal mining, metal mining, dairying, poultry and eggs, the peach and cantaloupe industries, all of which are of dominant importance in their communities, may likewise be held to be so charged with public interest as to empower the legislature to regulate prices, control supply, grant and withhold licenses, and even create monopoly without transcending its police power or violating the due process clause of the 14th amendment.

THE MARCH OF BUREAUCRACY

Each conversion of private business to a public use classification means the creation of another statutory administrative agency—a new bureau, commission or board of control. Thus the march of bureaucracy goes forward with increasing power until American business finds itself enmeshed in a tangle of administrative regulations depriving it of its right to determine the prices of commodities, the levels of wages, hours of employment, rates of service, the number of acres of wheat, cotton or corn it may plant, or the number of hogs it may raise. The outstanding political and legal development of the 20th century is this harvest of administrative tribunals. Lincoln's government "of the people, by the people and for the people," is being transformed, it is sug-

gested, into a government of bureaucracy, by bureaucracy and for bureaucracy. A Lord Chief Justice of England has named it "The New Despotism" and has published a book on the subject. The American Bar Committee on Citizenship has pronounced it a menace to the safety of American institutions. In 1926 President Coolidge said:

> "Of all forms of government, those administered by bureaus are about the least satisfactory to an enlightened and progressive people. Being irresponsible, they become autocratic, and being autocratic they resist all development. Unless bureaucracy is constantly resisted it breaks down representative government and overwhelms democracy. It is the one element in our institutions that sets up the pretense of having authority over everybody and being responsible to nobody."

ADMINISTRATIVE POWER

Though foreign to our scheme of government, and unrecognized and unclassified as yet in our system of jurisprudence, administrative bureaus already constitute the largest part of our governmental machinery. Yet the Supreme Court of Ohio has said "there is no such power as administrative power. All powers of government are vested in three departments, legislative, executive and judicial." These bureaus, frequently referred to as tribunals, make their own rules of procedure, formulate their own practices and methods of investigation, conduct hearings under their own rules of evidence, and arrive at and enforce their quasi-judgments without the impediments of code, common law or statutory control, and the citizen whose personal or property rights are affected has very limited opportunity of judicial review, because these tribunals exercise discretionary power. Constitutional limitations have had slight restrictive effect on the growth of bureaucracy though the final word has not yet been spoken by the judiciary.

The tendency to fasten the attribute of a public interest, and the equivalent of a certificate of convenience and necessity, upon such a multitude of private businesses and industries is stretching the police and general welfare powers of government to the point of danger, unless, forsooth, we have arrived at the place where we are ready to alter our form of government. How deeply we shall submerge American business and industry in the utility melting pot is a political and

constitutional question fraught with unusual interest to lawyers, judges, statesmen and the public at large. The legislative trend is undoubtedly toward price-fixing, expansion of public control of business and continual increase of administrative boards, bureaus and commissions.

References: Block v. Hirsh, 256 U. S. 135, 155, 41 S. Ct. 458, 459; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; 39 Yale Law Journal, 1089, 1094; New State Ice Co. v. Liebman, 52 S. Ct. 371, 285 U. S. 262; People v. Nebbia, 262 N. Y. 259; Frost v. Corp. Commission, 278 U. S. 515; German American Co. v. Lewis, 233 U. S. 389, 34 S. Ct. 612.

OUR JUSTICE COURTS

The following is taken from the Ohio Bar Association report of April 1, 1935:

"An opportunity to end the crying evil of the justice of the peace courts in Ohio is offered to the legislature in the pending Wilkins bill, which has been recommended for passage by the Judiciary Committee of the Ohio House of Representatives.

"The brand of 'justice' dispensed by many of these courts, especially in the vicinity of large cities, is indefensible. The only requirement for a justice of the peace is that he be a voter of the district in which he functions. He may be corrupt; he may be ignorant—but if elected he is the man to whom a large part of the population must look for justice in minor civil and criminal cases. * * *

"This bill is the product of thorough study by an Ohio State Bar Association committee, headed by Henry G. Binns, Columbus attorney. It has the approval also of the Judicial Council of Ohio, composed of the chief justice of the Supreme Court and representatives of the other judicial benches in the state.

"It promises even-handed justice for the small litigant and the minor offender, now at the mercy of incompetent, sometimes venal, squires. The legislature should pass the bill without hesitation and open the way for a long needed reform."—*Columbus Citizen.*

Denver is fortunate in having as the justices in our two Justices of the Peace Courts, Mr. Henry S. Lindsley and Mr. James N. Sabin, two young lawyers who have devoted a great deal of time and effort toward improvement of Justice Court practice and who have been patient and courteous at all times and have given universal satisfaction in their administrations.

The crying evil connected with our Justice of the Peace Courts is that unauthorized practice continues in full and uninterrupted sway.